

IN THE OFFICE OF THE CLERK  
**Supreme Court of the United States**  
OCTOBER TERM, 1993

STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,  
Attorney General of the State of Arkansas,  
v. *Petitioner,*

BOBBIE E. HILL, *et al.*,  
*Respondents.*

**Petition for a Writ of Certiorari  
to the Supreme Court of Arkansas**

**PETITION FOR A WRIT OF CERTIORARI**

WINSTON BRYANT \*  
Attorney General  
JEFFREY A. BELL  
Deputy Attorney General  
ANN PURVIS  
Assistant Attorney General  
200 Tower Building  
323 Center Street  
Little Rock, AR 72201  
(501) 682-2007  
GRIFFIN B. BELL  
PAUL J. LARKIN, JR.  
POLLY J. PRICE  
KING & SPALDING  
1730 Pennsylvania Ave., N.W.  
Washington, D.C. 20006-4706  
(202) 737-0500  
CLETA DEATHERAGE MITCHELL  
Term Limits Legal Institute  
900 Second St., N.E.  
Suite 200A  
Washington, D.C. 20002  
(202) 371-0450

\* Counsel of Record

*Attorneys for Petitioner*



## **QUESTION PRESENTED**

Amendment 73 to the Arkansas Constitution restricts access to the ballot for certain incumbent candidates for the offices of United States Representative and Senator. Amendment 73 provides that a person who has been elected to three or more terms as a member of the United States House of Representatives, or to two or more terms as a member of the United States Senate, cannot thereafter have his or her name placed on the ballot for that office, although a candidate may still be elected through a write-in campaign. The question presented by this case is the following:

Whether a state has the power under the Elections Clause of the Constitution, Art. I, § 4, Cl. 1, to restrict an incumbent candidate's access to the ballot in such a manner, or whether the Qualifications Clauses of the Constitution, Art. I, § 2, Cl. 2, and § 3, Cl. 3, prohibit a state from imposing such a ballot access restriction.

## **PARTIES TO THE PROCEEDING**

The following were parties in the court below:

Petitioner:

State of Arkansas ex rel. Attorney General Winston Bryant

Respondents:

Bobbie E. Hill, individually and on behalf of the Arkansas League of Women Voters; Dick Herget, individually;

State Constitutional Officers:

W. J. "Bill" McCuen, Secretary of State; Julia Hughes Jones, State Auditor; Jimmie Lou Fisher, State Treasurer; Winston Bryant, Attorney General; Charlie Daniels, Land Commissioner, individually and in their capacities as candidates for public office;

United States Senators:

Dale Bumpers and David Pryor

United States Representatives:

Ray Thornton, Blanche Lambert, Jay Dickey and Tim Hutchinson; and former representatives Beryl Anthony, Bill Alexander and John Paul Hammer-schmidt

Members, Arkansas State Legislature, former and current:

Senate:

James C. "Jim" Scott, W. D. "Bill" Moore, Jr., Mike Ross, Wayne Dowd, Neely Cassady, George Hopkins, Jean C. Edwards, Jay Bradford, Bill Walters, Travis A. Miles, Lu Hardin, Eugene "Bud" Canada, Charlie Cole Chaffin, Vic Snyder, Jerry D. Jewell, Cliff Hoofman, Stanley Russ, Mike Beebe, Roy C. "Bill" Lewellen, Mike Everett, Steve Bell, Allen Gordon, Jon S. Fitch, Morrill Harriman, Mike

Bearden, Jerry P. Bookout, Mike Todd, Nick Wilson, Steve Luelf, Joe E. Yates, David R. Malone, Clarence Bell, Jack Anderson Gilson, Max Howell, John Pagan, Kevin Smith, Jim Keet, Bill Gwatney, and Reid Holiman

House:

Railey A. Steele, Jerry E. Hinshaw, Louis McJunkin, Charles W. Stewart, Bob Fairchild, Jerry Hunton, Edward F. Thicksten, B.G. Hendrix, Carolyn Pollan, Ralph "Buddy" Blair, Jr., Jerry D. King, W.R. "Bud" Rice, Ode Maddox, Gus Wingfield, Hoye D. Horn, David Beatty, Arthur Carter, Charles Whorton, Jr., Frank J. Willems, Lloyd R. George, Keith Wood, Bob J. Watts, L.L. "Doc" Bryan, Bruce Hawkins, Ted E. Mullenix, James C. Allen, John W. Parker-son, Bob "Sody" Arnold, Judy Smith, John H. Dawson, Billy Joe Purdom, Roger L. Rorie, Randy Thurman, W. H. "Bill" Sanson, Bill Stephens, Larry Mitchell, H. Lacy Landers, Veo Easley, Bobby G. Newman, Jodie Mahony, Phil Wyrick, Myra Jones, Jim Argue, Jr., William L. "Bill" Walker, Jr., Mark Pryor, Irma Hunter Brown, Carol "Coach" Henry, James G. Dietz, Doug Wood, Mike Wilson, William H. Townsend, Larry Goodwin, John E. Miller, John Paul Capps, J. Sturgis Miller, Josetta E. Wilkins, Jacqueline J. Roberts, Charlotte Schexnayder, Jimmie Don McKissack, Michael K. Davis, Thomas G. Baker, Albert "Tom" Collier, V.O. "Butch" Calhoun, Wanda Northcutt, James T. Jordon, N.B. "Nap" Murphy, Jim Holland, Tim Woolridge, Bobby G. Wood, Bobby L. Hogue, Owen Miller, J.L. "Jim" Shaver. Pat Flanagan, Wayne Wagner, Walter M. Day, Christine Brownlee, Ben McGee, Lloyd C. McCuiston, Jr., Bob McGinnis, Ernest Cunningham, Jimmie L. Wilson, Bynum Gibson, Tim Hutchinson, James Edward "Ed" Gilbert, Richard L. "Dick" Barclay, Bill D. Porter, Tommy E. Mitchum, James H. "Jim" Roberts, William P. "Bill" Mills, Robert Vaughn "Bob" Teague, David E. Roberts, Arthur

"Art" Givens, Jr., Jack H. McCoy, Robert Wayne "Bobby" Tullis, John M. Lipton, G.W. "Buddy" Turner, Tom Forgey, Travis Dowd, Dana A. Moreland, Jim Von Gremp, Dave Bisbee, Randy Bryant, John Hall, Jim Hill, Dennis Young, Armil O. Curran, D.R. "Buddy" Wallis, Vada Sheid, Greg Wren, E. Ray Stalnaker, Mark Riable, Dee Bennett, Joe Molinaro, David Choate, Bill Fletcher, Marian D. Owens, and Claud V. Cash

**Others:**

George O. Jernigan, Asa Hutchinson, Lula Binns, Shirley McFarlin, Richard Bifford and Bonnie Johnson, as members of the Arkansas State Board of Election Commissioners;

Republican Party of Arkansas

Democratic Party of Arkansas

Arkansans for Governmental Reform, Inc., and Lawrence Cook, Timothy Jacob, Steve Munn, Tim Epperson, Lance Curtis, Miles King, David Jamison, Sy Mendenhall, Teresa Ulery, Eual Petty, Tommy Munn, Tommy White, Dr. Bill McCollum, Richard Trubey, Leon Perry, Bruce Burks, Howard Studdard, J.D. Crow and Claudie Ray Ollar

U.S. Term Limits, Inc., Frank Gilbert, Greg Rice, Lon Schultz, and Spencer Plumley

Americans for Term Limits, Steve Goss

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STATE OF ARKANSAS *ex rel.* WINSTON BRYANT,  
Attorney General of the State of Arkansas,  
*Petitioner,*

v.

BOBBIE E. HILL, *et al.*,  
*Respondents.*

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**Petition for a Writ of Certiorari  
to the Supreme Court of Arkansas**

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**PETITION FOR A WRIT OF CERTIORARI**

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The Attorney General of Arkansas, on behalf of the State of Arkansas, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Arkansas in this case.

**OPINIONS BELOW**

The opinion of the Supreme Court of Arkansas, 93-1456 Pet. App. 1a-43a,<sup>1</sup> is reported at 316 Ark. 251. The opinions of the circuit court, Pet. App. 45a-52a, 53a-62a, are unreported.

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<sup>1</sup> The petition appendix in No. 93-1456 contains the materials required by this Court's Rule 14.1(k). We will hereafter use the term "Pet. App." to refer to the petition appendix in No. 93-1456, which is the petition filed by U.S. Term Limits, Inc., *et al.*, for review of the judgment below. This petition constitutes the State of Arkansas' response to the petition in No. 93-1456.

## **JURISDICTION**

The judgment of the Supreme Court of Arkansas was entered on March 7, 1994. A petition for rehearing was denied on March 14, 1994. Pet. App. 44a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

### **CONSTITUTIONAL PROVISIONS INVOLVED**

1. Article I, § 2, Cl. 2, of the Constitution of the United States provides as follows:

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

2. Article I, § 3, Cl. 3, of the Constitution of the United States provides as follows:

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

3. Article I, § 4, Cl. 1 (the Elections Clause), of the Constitution of the United States provides as follows:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such regulations, except as to the Places of choosing Senators.

4. The Tenth Amendment to the Constitution of the United States provides as follows:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

5. Amendment 73 to the Arkansas Constitution provides as follows:

**PREAMBLE:**

The people of Arkansas find and declare that elected officials who remain in office too long become pre-occupied with reelection and ignore their duties as representatives of the people. Entrenched incumbency has reduced voter participation and has led to an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers. Therefore, the people of Arkansas, exercising their reserved powers, herein limit the terms of elected officials.

**SECTION 1—Executive Branch**

(a) The Executive Department of this State shall consist of a Governor, Lieutenant Governor, Secretary of State, Treasurer of State, Auditor of State, Attorney General, and Commissioner of State Lands, all of whom shall keep their offices at the seat of government, and hold their offices for the term of four years, and until their successors are elected and qualified.

(b) No elected officials of the Executive Department of this State may serve in the same office more than two such four years terms.

**SECTION 2—Legislative Branch**

(a) The Arkansas House of Representatives shall consist of members to be chosen every second year by the qualified electors of the several counties. No member of the Arkansas House of Representatives may serve more than three such two year terms.

(b) The Arkansas Senate shall consist of members to be chosen every four years by the qualified electors of the several districts. No member of the Arkansas Senate may serve more than two such four year terms.

### SECTION 3—Congressional Delegation

(a) Any person having been elected to three or more terms as a member of the United States House of Representatives from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States House of Representatives from Arkansas.

(b) Any person having been elected to two or more terms as a member of the United States Senate from Arkansas shall not be certified as a candidate and shall not be eligible to have his/her name placed on the ballot for election to the United States Senate from Arkansas.

### SECTION 4—Severability

The provisions of this Amendment are severable, and if any should be held invalid, the remainder shall stand.

### SECTION 5—Provisions Self-Executing

Provisions of this Amendment shall be self-executing.

### SECTION 6—Application

(a) This Amendment to the Arkansas Constitution shall take effect and be in operation on January 1, 1993, and its provisions shall be applicable to all persons thereafter seeking election to the offices specified in this Amendment.

(b) All laws and constitutional provisions which conflict with this Amendment are hereby repealed to the extent that they conflict with this Amendment.

### STATEMENT

1. At issue in this case is whether the Constitution allows the States to structure their electoral procedures for the offices of United States Representative and Senator in order to ensure that the institutional advantages of in-

cumbency (particularly long-term incumbency) neither create nor perpetuate modern-day legislative fiefdoms that, by crippling the ability of challengers to unseat office-holders, render the political process unresponsive to the electorate. The Framers of the Constitution envisioned frequent turnover for legislative offices, especially for the House of Representatives, whose members must stand for re-election biennially. For most of our history, the Framers' prediction was correct. But over the past two decades, congressional incumbents have been re-elected at an unprecedented—and, to some, alarming—rate.<sup>2</sup> In response, since 1990 more than 22 million votes have been cast in 15 states to enact state laws (through citizen initiatives) that either prohibit individuals from holding congressional office for more than a fixed number of terms or that restrict access to the ballot by incumbent Members of Congress, while still permitting them to be re-elected via write-in campaigns.

This case involves the constitutionality of one of the latter type of election laws. At the November 1992 general election, the electorate of Arkansas, by a 60% to 40% margin, endorsed an initiative adopting Amendment 73 to the Arkansas Constitution. As relevant here, Amendment 73 provides that a person who has been elected to three or more terms as a member of the United States House of Representatives, or to two or more terms as a member of the United States Senate, cannot thereafter have his or her name placed on the ballot for that office, although an incumbent may still be elected through

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<sup>2</sup> For example, in the past three congressional elections 98%, 96%, and 88% of the incumbents in the House of Representatives who sought re-election won. Moreover, at least 90% of all incumbents seeking re-election were retained in every congressional election from 1974 to 1990. Robert C. DeCarli, Note, *The Constitutionality of State-Enacted Term Limits Under the Qualifications Clauses*, 71 Tex. L. Rev. 865, 866 n.7 (1993); Troy A. Eid & Jim Kolbe, *The New Anti-Federalism: The Constitutionality of State-Imposed Limits on Congressional Terms of Office*, 69 Denv. L. Rev. 1, 4 (1992).

a write-in campaign.<sup>3</sup> Amendment 73 rests on the belief, as stated in its preamble, that “elected officials who remain in office too long become preoccupied with reelection and ignore their duties as representatives of the people.” The Amendment was designed to rectify the deleterious effects of “[e]ntrenched incumbency,” which have included “reduced voter participation” and “an electoral system that is less free, less competitive, and less representative than the system established by the Founding Fathers.” The question presented by this case is whether the Election Clause of the Constitution, Art. I, § 4, Cl. 1, permits the state to remedy those ills through Amendment 73, or whether the Qualifications Clauses, Art. I, § 2, Cl. 2, and § 3, Cl. 3, prohibit Arkansas from pursuing such corrective action.

2. In November 1992, respondents Bobbie E. Hill, *et al.*, filed a complaint in the Circuit Court of Pulaski County, seeking a declaratory judgment that Amendment 73 to the Arkansas Constitution was unconstitutional under Articles I and IV of the Constitution of the United States and the First and Fourteenth Amendments, insofar as Amendment 73 impaired the ability of an incumbent Member of the House of Representatives or the Senate to be re-elected to that office.<sup>4</sup> On cross-motions for summary judgment, the circuit court held that Amendment 73 violated state law and the Qualifications Clauses of the Constitution, Art. I, § 2, Cl. 2, § 3, Cl. 3. Pet. App.

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<sup>3</sup> Amendment 73 also limits the terms that can be held by certain state officers, such as the Governor, Lieutenant Governor, and Attorney General. State offices are not governed by the Qualifications Clauses of Article I, which apply only to United States Representatives and Senators. The Arkansas Supreme Court upheld the term limits imposed by Amendment 73 on state officers, and that aspect of the ruling below is not before the Court on this petition.

<sup>4</sup> Respondents also claimed that Amendment 73 was invalid on various state law grounds. The Arkansas Supreme Court rejected those claims, and they do not bear on the question presented by this petition.

45a-52a, 53a-62a. The court reasoned that “[Amendment 73] is purely and simply a restriction on the qualifications of a person seeking federal congressional office,” *id.* at 49a, and that the Qualifications Clauses forbid states from imposing qualifications on federal officeholders in addition to the ones set forth in Article I, *id.* at 48a-49a.<sup>5</sup>

3. By a divided vote, the Arkansas Supreme Court affirmed in part and reversed in part. Pet. App. 1a-43a. The court held that Amendment 73 is not invalid under state law, but does violate Article I of the Constitution.

a. A plurality concluded that the historical background to the adoption of the Qualifications Clauses was “helpful” but ultimately “inconclusive regarding the issue at hand.” Pet. App. 12a. Nevertheless, relying, *inter alia*, on that history and *Powell v. McCormack*, 395 U.S. 486 (1969), the plurality reasoned that Article I “enumerated three benchmarks for congressional service—age, citizenship, and residency”—and that “[n]o other qualifications were included.” *Id.* at 12a. That conclusion is a sensible one, the plurality wrote, since it ensures that the qualifications for Representatives and Senators are uniform nationwide. *Id.* at 14a.

The plurality also ruled that Amendment 73 cannot be upheld as an exercise of the state’s power to regulate candidates’ access to the ballot. Pet. App. 14a-15a. The plurality reasoned that the intent and effect of Amendment 73 “are to disqualify congressional incumbents from further service” by superimposing “[a]n additional qualification” atop the ones already specified in Article I: *viz.*, “prior service.” *Id.* at 15a. The plurality acknowledged that the Amendment does not “totally disqualif[y]” incumbents from becoming officeholders, since an incumbent can run as a write-in candidate for such an office. *Id.*

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<sup>5</sup> The circuit court rejected respondents’ contentions that Amendment 73 violated Article IV of the Constitution, as well as the First and Fourteenth Amendments. Pet. App. 59a, 60a.

But “[t]hese glimmers of opportunity” were, according to the plurality’s view, too “faint” to “salvage Amendment 73 from constitutional attack.” *Id.* Finally, because Amendment 73 violated the Qualifications Clauses, the plurality determined that the Amendment *could* not be upheld under the power reserved to the states by the Tenth Amendment. *Id.*

In separate opinions, Justices Dudley and Brown concurred in the ruling that Amendment 73 violates the Qualifications Clauses. Pet. App. 26a-27a, 41a-42a. Justice Dudley stated that Amendment 73 is unconstitutional because the Framers rejected term limits for Representatives and Senators when drafting the Constitution and because allowing states to impose additional qualifications beyond the ones specified in Article I “is antithetical to republican values.” *Id.* at 26a. He acknowledged that whether the ballot access limitations imposed by Amendment 73 are constitutional “is a close question and difficult issue,” *id.*, but he ultimately found the limitations invalid under Article I, because “as a practical matter, write-in candidates are at a distinct disadvantage” in an election, *id.* at 27a. Justice Brown also noted that “the issue is not entirely free from doubt,” but, he, too, ultimately concluded that the Framers had considered and rejected term limits for legislative offices when drafting Article I. *Id.* at 41a. The advantages of having uniform, nationwide qualifications for federal offices, he added, fortified his conclusion. *Id.* at 41a-42a.<sup>6</sup>

b. Justices Hays and Cracraft dissented. Pet. App. 33a-35a, 37a-39a. According to Justice Hays, the Tenth Amendment guarantees states the right to structure their own forms of government and, in so doing, to set qualifi-

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<sup>6</sup> The Arkansas Supreme Court did not address the question whether, as applied to federal office, Amendment 73 violates Article IV of the Constitution or the First and Fourteenth Amendments. That court did address whether the term limits imposed on state officials violated the First or Fourteenth Amendments, and held that they do not.

cations for candidates to state or federal offices as long as those requirements do not violate the Qualifications Clauses. Since those Clauses fix only "the *minimum* requirements rather than the *exclusive* requirements," *id.* at 34a, states may add additional qualifications under state law, *id.* at 34a-35a. Justice Cracraft determined that the ballot access restrictions set by Amendment 73 are not "qualifications" for purposes of Article I, because they do not bar an elected candidate from holding office if he receives the majority of votes cast. *Id.* at 37a. Relying on *Hopfmann v. Connolly*, 746 F.2d 97 (1st Cir. 1984), vacated in part on other grounds, 471 U.S. 459 (1985), and *Joyner v. Mofford*, 706 F.2d 1523 (9th Cir.), cert. denied, 464 U.S. 1002 (1983), Justice Cracraft stated that "the test to determine whether or not the restriction amounts to a qualification within the meaning of Article I, Section 3, is whether the candidate could be elected if his name were written in by a sufficient number of electors." Pet. App. 38a (internal punctuation omitted). Amendment 73 passed that test, he determined, since "[u]nder our liberal write-in laws, an incumbent can be elected to congressional office and, if elected, serve the term for which elected." *Id.* at 37a.

## REASONS FOR GRANTING THE PETITION

This case presents an important, recurring, and unsettled question regarding the proper interpretation of the Qualifications and Elections Clauses of the Constitution. The Supreme Court of Arkansas held that the ballot access restrictions imposed by Amendment 73 on incumbent candidates for the House of Representatives and the Senate are unconstitutional under the Qualifications Clauses. In so ruling, that court applied a standard to determine whether state regulation of the electoral process is a "qualification" for purposes of Article I that is inconsistent with the test applied by three federal courts of appeals. In addition, the court below held Amendment 73 unconstitutional based on its misreading of this Court's 1969 decision in *Powell v. McCormack*, while ignoring the Court's subsequent decision in *Storer v. Brown*, 415 U.S. 724 (1974), which upheld a ban on the right to run for federal legislative office over a Qualifications Clause challenge. Lastly, the decision below forbids Arkansas from attempting, as have 14 other states, to rectify what it perceives as a fundamental defect in the congressional electoral process. Accordingly, in light of the disagreement among the lower courts on the correct standard for measuring a "qualification" for Congress, the inconsistency between the decision below and this Court's precedents, and the importance of the question presented, review by this Court is warranted.

1. The linchpin of the Arkansas Supreme Court's analysis is its conclusion that the Amendment 73 ballot access restrictions impose an "additional qualification" on the office of Representative and Senator. Pet. App. 15a.<sup>7</sup>

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<sup>7</sup> As the plurality summarized: "An additional qualification has been added to congressional eligibility. That list now reads age, nationality, residency, and prior service. \* \* \* [T]he Qualification clauses fix the sole requirements for congressional service. This is not a power left to the States under the Tenth Amendment. The attempt to add an additional criterion based on length of service is in direct conflict with the Qualification clauses, and the Supremacy Clause pertains." Pet. App. 15a.

The ruling that the denial of access to the ballot is a "qualification" for purposes of Article I is inconsistent with the approach followed by the First, Ninth, and Eleventh Circuits to evaluate the constitutionality, under the Qualifications Clauses, of other state regulations of the electoral process for federal office.

In *Hopfmann v. Connolly* the First Circuit held that a law does not impose a "qualification" for office for purposes of Article I unless that law renders a candidate ineligible to hold office if he garners a majority of the votes cast in an election. 746 F.2d at 102-103. The law at issue provided that only candidates receiving 15% of the vote on a ballot at the convention could challenge the convention's endorsement in a state primary election. The court of appeals sustained that provision against a challenge based on the Qualifications Clauses. As the First Circuit explained, "the test to determine whether or not the 'restriction' amounts to a 'qualification' within the meaning of Article I, Section 3, is whether the candidate 'could be elected if his name were written in by a sufficient number of electors.'" *Id.* at 103 (quoting *State v. Crane*, 197 P.2d 864, 871 (Wy. 1948)).

In *Joyner v. Mofford* the Ninth Circuit held that a "resign to run" law, which requires a state officer to resign his position in order to become a candidate for federal elected office, "does not impose a fourth qualification on candidates for Congress because it does not prevent an elected state officeholder from running for federal office." 706 F.2d at 1531. Such requirements impose only an "indirect burden" on congressional candidates, the court ruled, *id.*, since they do not "bar a potential candidate from running for federal office," *id.* at 1528.

Finally, in *Public Citizen v. Miller*, 813 F. Supp. 821 (N.D. Ga.), *aff'd* on the basis of the district court opinion, 992 F.2d 1548 (1993), the Eleventh Circuit upheld a Georgia statute requiring a run-off election for the Senate if no candidate garners a majority of the votes cast in

a general election. Relying on the standard articulated by the First Circuit in *Hopfmann v. Connolly*, 746 F.2d at 103, the district court explained that the majority vote requirement does not impose a "qualification" for purposes of Article I, and is "merely a restatement of the truism that in a race between two people, the person who receives the most votes wins." 813 F. Supp. at 832-33. The court of appeals endorsed that rationale by upholding the statute "for the reasons set forth in the Order entered by th[e district] court." 992 F.2d at 1548.

As Justice Cracraft explained in dissent below, Pet. App. 37a-39a, the ballot access restrictions imposed by Amendment 73 do not fix a "qualification" for the office of Representative or Senator under the test applied by the First, Ninth, and Eleventh Circuits, since that Amendment does not prevent a candidate who receives the majority of votes cast at the election from holding those offices. The Amendment only restricts access to the ballot for congressional candidates, while imposing a strict term limit on state officers. Indeed, the Arkansas Supreme Court readily acknowledged that any congressional incumbent could run for those offices as a write-in candidate and that any write-in candidate receiving a majority of the votes cast at a general election would be entitled to hold office. Pet. App. 15a. But that court went on to equate the practical difficulties facing a write-in candidate with a prohibition on holding office. Although it is doubtless the case that ballot access restrictions may make it more difficult for some write-in candidates to win some elections, that is not always the case. Write-in candidates won election to Congress from Arkansas in 1958 and 1960. In any event, the standard applied by the First, Ninth, and Eleventh Circuits does not treat a restriction as a "qualification" unless it prohibits a candidate who is victorious at the polls from holding office *as a matter of law*. Because Amendment 73 does not have that effect, it would not be treated as a "qualification" under the test applied by three federal courts of appeals. The disagreement over

the correct test to determine whether state regulation of the electoral process imposes a "qualification" for purposes of Article I warrants review by this Court.

2. The question presented is also of sufficient national importance and will recur with sufficient regularity to justify review by this Court. In fact, it is no overstatement to say that the question presented involves some of the most important election law issues ever to come before this Court.<sup>8</sup>

a. During the 18th and 19th centuries, voluntary rotation of office was a common tradition. Officials ordinarily

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<sup>8</sup> The constitutionality of such laws has generated considerable debate in the legal community. See, e.g., Brendan Barnicle, Comment, *Congressional Term Limits: Unconstitutional by Initiative*, 67 Wash. L. Rev. 415 (1992); Erwin Chemerinsky, *Protecting the Democratic Process: Voter Standing to Challenge Abuses of Incumbency*, 49 Ohio St. L.J. 773 (1988); Erik H. Corwin, Recent Developments, *Limits on Legislative Terms: Legal and Policy Implications*, 28 Harv. J. on Legis. 569 (1991); Robert C. DeCarli, Note, *supra*; Troy A. Eid & Jim Kolbe, *supra*; Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 Hofstra L. Rev. 341 (1991); Steven Greenberger, *Democracy and Congressional Tenure*, 41 DePaul L. Rev. 37 (1991); Roderick M. Hills, Jr., *A Defense of State Constitutional Limits on Federal Congressional Terms*, 53 U. Pitt. L. Rev. 97 (1991); Tiffanie Kovacevich, Comment, *Constitutionality of Term Limitations: Can States Limit the Terms of Members of Congress?*, 23 Pac. L.J. 1677 (1992); William Kristol, *Term Limitations: Breaking Up the Iron Triangle*, 16 Harv. J.L. & Pub. Pol. 95 (1992); Martin Latz, *The Constitutionality of State-Passed Congressional Term Limits*, 25 Akron L. Rev. 155 (Summer 1991); Joshua Levy, *Can They Throw the Bums Out? The Constitutionality of State-Imposed Congressional Term Limits*, 80 Geo. L.J. 1913 (1992); Daniel Lowenstein, *Are Term Limits Constitutional?* (American Political Science Ass'n Sept. 4, 1993); Johnathan Mansfield, Note, *A Choice Approach to the Constitutionality of Term Limitation Laws*, 78 Cornell L. Rev. 966 (1993); James C. Otteson, *A Constitutional Analysis of Congressional Term Limits: Improving Representative Legislation Under the Constitution*, 42 DePaul L. Rev. 1 (1991); Stephen J. Safranek, *Term Limitations: Do the Winds of Change Blow Unconstitutional?*, 26 Creighton L. Rev. 321 (1993); George F. Will, *Restoration* (1992).

served no more than two terms in the House and one in the Senate.<sup>9</sup> This century, however, has witnessed a dramatic surge in the number of long-term incumbents. The number of members spending 12 or more years in the House of Representatives has jumped from less than 20 at the turn of the century to nearly 200 today, and nearly half of the Senators now remain in office for 12 or more years.<sup>10</sup> The Framers' ideal of "citizen-legislators"—individuals temporarily serving the nation in Congress before returning to private life—has been eclipsed by the cynical (and corrosive) belief that elected officials often are simply entrenched career politicians more interested in permanently maintaining their sinecures than in representing the people.

Arkansas and 14 other states have attempted to remedy that problem for their representatives in Congress by establishing term limits or ballot access restrictions.<sup>11</sup> As the result, 156 Representatives and 30 Senators are now subject to such laws,<sup>12</sup> and term limits initiatives are expected to appear on the ballot in a number of states this year.<sup>13</sup> The Arkansas Supreme Court, however, has

<sup>9</sup> See Sula P. Richardson, *Congressional Tenure: A Review of Efforts to Limit House and Senate Service* 4-5 (CRS Report Sept. 13, 1989).

<sup>10</sup> George F. Will, *supra*, at 73-89.

<sup>11</sup> See Ariz. Const. art. VII, § 18; Cal. Elec. Code § 25003 (Deering 1993); Colo. Const. art. XVIII, § 9; Fla. Const. art. 6, § 4; Mich. Const. art. II, § 10; Mo. Const. art. III § 45(a); Mont. Const. art. IV, § 8; Neb. Const. art. XV, § 20; N.D. Cent. Code § 16.1-01-13.1; Ohio Const. art. V, § 8; Ore. Const. art. II, § 20; S.D. Const. art. III, § 32; Wash. Rev. Code § 29.68.015-016 (West 1992); Wyo. Stat. § 22-5-104 (1992); Robert C. DeCarli, 71 Texas L. Rev. at 865 n.5 (discussing the different laws). But see page 23 note 33, *infra*.

<sup>12</sup> Robert C. DeCarli, 71 Tex. L. Rev. at 865.

<sup>13</sup> A January 1994 survey indicated that 74% of those surveyed said they favored congressional term limits. Kevin Merida, *Americans Want a Direct Say in Political Decision-Making*, *Pollsters Find*, Washington Post, Apr. 29, 1994, at A19.

thwarted the will of the people of the state by its erroneous application of Article I and *Powell*.<sup>14</sup>

b. The interpretation of Article I adopted by the Arkansas Supreme Court also calls into question numerous other state regulations of the electoral process. No state has left elections to the free market; both historically and today, every state imposes some restrictions or requirements on candidacy for the House of Representatives and the Senate. In Arkansas, for example, candidates for Congress must possess the qualifications of registered voters as defined by state law.<sup>15</sup> Furthermore, under Arkansas law no one appointed by the Governor to fill a vacancy in the Senate is eligible to succeed himself, and spouses and relatives within the fourth degree of consanguinity or affinity to the Governor and Lieutenant Governor cannot be appointed to fill Senate vacancies.<sup>16</sup> Other states also require that candidates for Congress qualify as "electors," *i.e.*, voters.<sup>17</sup> Many states require that electors must be state residents (although the length of the residency period varies).<sup>18</sup> Many states require

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<sup>14</sup> As the Ninth Circuit has observed, "for better or worse, the people generally resort to ballot initiatives precisely because they do not believe that the ordinary processes of representative government are sufficiently sensitive to the popular will with respect to a particular subject." *Yniguez v. Arizona*, 939 F.2d 727, 733 (9th Cir. 1991).

<sup>15</sup> Ark. Const. Art. 19 § 3.

<sup>16</sup> Ark. Const. Amend. 29, § 2.

<sup>17</sup> *E.g.*, Ill. Ann. Stat. Ch. 10, Para. 5/7-10 (1993); Iowa Code Ann. § 43.18 (1993); Mo. Ann. Stat. § 115.349 (1993); N.C. Const. Art. VI, § 6; R.I. Const. Art. 3, § 1. But cf. *Danielson v. Fitzsimmons*, 232 Minn. 149, 44 N.W.2d 484 (1950) (convicted felon can qualify for federal office notwithstanding state constitutional provision to the contrary).

<sup>18</sup> *E.g.*, Del. Code Ann. tit. 15, § 4101 (1981); Idaho Code § 34-604 (Supp. 1991); Minn. Stat. Ann. § 204B.06(c) (Supp. 1990-

candidates to submit petitions with a specific number or percent of signatures by local registered voters in order to appear on the ballot.<sup>19</sup> Some states require congressional candidates in primary elections to show allegiance to (or independence from) a political party.<sup>20</sup> Arkansas and many other states prohibit candidates from running in the general election if they have lost in a primary.<sup>21</sup> And many states forbid candidates for Congress from holding state office or seats on state courts or from running for two seats concurrently.<sup>22</sup> According to a compilation prepared by the Federal Election Commission, state laws governing congressional elections "are enormously complex. They vary, for example, by state, by type of election, by type of federal office, by type of party or candidate, and by type of criteria and procedure."<sup>23</sup>

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1991); N.H. Rev. Stat. Ann. § 655:2 (1986); Va. Code Ann. § 5 (Michie 1985).

<sup>19</sup> *E.g.*, Ala. Code § 17-7-1(a)(3) (Supp. 1993); Cal. Elec. Code §§ 6831 & 6838 (Deering 1993); Fla. Stat. Ann. § 99.096 (1982); Iowa Code Ann. § 43.20 (West Supp. 1992); Ky. Rev. Stat. Ann. 118.315(2) (1993); N.Y. Elec. Law § 6-142 (McKinney Supp. 1993).

<sup>20</sup> *E.g.*, Colo. Rev. Stat. § 1-4-601(4) (Supp. 1993); Del. Code Ann. tit. 15, § 3002(b) (Supp. 1990); Haw. Rev. Stat. § 12-3 (Supp. 1991); Iowa Code Ann. §§ 43.18 & 49.39 (West 1991); Mich. Comp. Laws Ann. § 6.1692-1693 (1993); N.C. Gen. Stat. § 163-106 (1991).

<sup>21</sup> *E.g.*, Ark. Code Ann. § 7-7-103(f) (Michie Supp. 1993); Kan. Stat. Ann. §§ 25-205, 25-202(c) (Supp. 1992); Md. Code Ann. Elec. § 8-2 (Supp. 1991); N.H. Rev. Stat. Ann. § 659:91-a (Supp. 1992); S.C. Code Ann. § 7-11-210 (Supp. 1992).

<sup>22</sup> *E.g.*, Alaska Const. art. IV, § 14; Ariz. Rev. Stat. Ann. § 38-296(A) (Supp. 1990-1991); La. Rev. Stat. Ann. tit. 18, § 453A (Supp. 1993); Me. Rev. Stat. Ann. tit. 21-A, § 351 (1993).

<sup>23</sup> 2 Federal Election Comm'n, *Ballot Access: For Congressional Candidates* (1988); see also *Senate Election Law Guidebook 1992*, S. Doc. No. 15, 102d Cong., 2d Sess. (1992). No one suggests that redistricting and reapportionment by states, for example, violates

All such laws would be called into doubt insofar as they apply to congressional elections if the Arkansas Supreme Court's application of Article I were correct.

3. The decision below is incorrect. Even if Amendment 73 were deemed to be a "qualification," the text of the Constitution itself shows that the Qualifications Clauses do not define the exclusive qualifications for Representative and Senator. The Impeachment Clause, Art. I, § 3, Cl. 7, authorizes the disqualification from federal office of any person convicted after being impeached.<sup>24</sup> The Incompatibility Clause, Art. I, § 6, Cl. 2, prohibits anyone from simultaneously holding office in both the Legislative and Executive Branches.<sup>25</sup> Section 3 of the Fourteenth Amendment disqualified anyone who fought for the Confederacy during the Civil War.<sup>26</sup> Finally, the

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the Qualifications Clauses, yet this is a broad power through which states determine the selection of their representatives.

<sup>24</sup> The Impeachment Clause provides as follows: "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust or Profit under the United States; but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law."

<sup>25</sup> The Incompatibility Clause provides as follows: "No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a member of either House during his Continuance in Office."

<sup>26</sup> Section 3 of The Fourteenth Amendment provides as follows: "No Person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort

Religious Test Clause, Art. VI, Cl. 3, prohibits the federal and state governments from imposing a religious test as a qualification for federal office, thereby indicating that such a test otherwise could have been imposed.<sup>27</sup> Taken together, these provisions show that the Qualifications Clauses do not fix the exclusive prerequisites for Congress and that other provisions of the Constitution are relevant and must be considered. The Election Clause, Art. I, § 4, Cl. 1, and the Tenth Amendment are two such provisions, and they support the constitutionality of ballot access laws, like Amendment 73.

The Arkansas Supreme Court focused on the scope of the Qualifications Clauses without considering the reach of the Election Clause or the Tenth Amendment. That approach was mistaken.

This Court has made clear that the various constitutional provisions governing the electoral process must be read as a whole, *Williams v. Rhodes*, 393 U.S. 23, 29 (1968); that states have the power to regulate access to the ballot under the Election Clause, even if some restrictions may exclude some candidates, *Storer v. Brown*, 415 U.S. 724, 728-37, 746 n.16 (1974); and that states have considerable power to establish qualifications for state officers, see *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2400-03 (1991). In *Storer v. Brown*, five years after this Court decided *Powell*, the Court upheld a state statute disqualifying a person from the ballot as an independent candidate for the House of Representatives if he voted in the immediately preceding primary or was registered in a

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to the enemies thereof. But Congress may by a vote of two thirds of each House, remove such disability."

<sup>27</sup> The Religious Test Clause provides as follows: "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

political party within one year prior to that primary. 415 U.S. at 728-37. In so ruling, the Court expressly rejected a Qualifications Clause challenge to the statute, holding that it no more imposed a "qualification" on federal office than a state law requiring a candidate, in order to garner a place on the ballot, to win a party primary or otherwise to establish substantial community support. *Id.* at 746 n.16. *Storer* thus establishes (at a minimum) that ballot access restrictions are not necessarily unconstitutional under the Qualifications Clauses even if they have an exclusionary effect.

The Court's holding in *Powell v. McCormack* does not answer the question presented by this case. There, the House of Representatives excluded Adam Clayton Powell from membership after his re-election based on Powell's alleged violations of House internal rules. This Court held that the House lacks the power to add to the qualifications specified in Art. I, § 2, Cl. 2, when it judges those qualifications under Art. I, § 5. 395 U.S. at 547-48. By contrast, this case involves a state law regulating access to the ballot, rather than the House's power to adjudicate the qualifications of its members. *Powell* did not address the authority of the state to require Powell (or other candidates for Congress) to meet certain restrictions and conditions under state election law. In fact, this Court acknowledged that Powell had been duly elected under New York law without addressing whether any of the state restrictions on congressional candidates imposed qualifications.<sup>28</sup> *Powell* held only that *Congress* lacks au-

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<sup>28</sup> Powell was a congressman from New York, and New York law in effect in 1966 included the following requirements: A candidate for the House of Representatives had to be a registered voter in the state and also had to satisfy durational and county residency requirements. A candidate could not have been convicted of any felony (including bribery) or any other infamous crime, and also could not have been adjudged mentally incompetent. A candidate also must have been literate in the English language; he must have satisfied political party enrollment requirements; he must have filed nominating petitions bearing a certain number of

thority to exclude a person who is not ineligible under the Constitution to serve and who has been duly elected under the laws of the state that he seeks to represent.

The Court has held consistently that states have power to regulate access to the ballot in order to protect the integrity of the electoral process and prevent voter confusion. See, e.g., *Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Bullock v. Carter*, 405 U.S. 134, 143, 145 (1972); *Storer v. Brown*, 415 U.S. at 728-37; *American Party of Texas v. White*, 415 U.S. 767, 782 n.14 (1971). Ballot access restrictions are a historic regulation of the electoral process.<sup>29</sup> Most states have had durational residency requirements;<sup>30</sup> other states have demanded that

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signatures as well as statements accepting the nomination and acknowledging his fulfillment of statutory requirements; and he must have satisfied state citizenship requirements. See N.Y. Elec. Law §§ 136, 137, 139, 147, and 152 (consol. 1964) (superceded).

<sup>29</sup> The debates over Art. I, § 4, Cl. 1, reveal that the states thought that they retained a significant measure of substantive control over selection of candidates. The debate in the North Carolina ratifying convention, for example, underscores the fear that Congress would exercise its power under Section 4 to override state election laws. 2 *The Debate on the Constitution* 854-60 (Bernard Bailyn ed. 1993) (hereafter *Debate on the Constitution*). Several states, including Massachusetts, New Hampshire, Maryland, and North Carolina proposed amendments limiting Congress' power to override state election laws. *Id.* at 548, 551, 554, 573. Proponents of the Constitution assured those who objected to Section 4 that Congress would not act to deprive states of substantive control absent insurrection or failure to send a representative to Congress. 1 *Debate on the Constitution* 428-29, 751. Ironically, one detractor believed Congress would pass laws under the authority of Art. I, § 4, Cl. 1, enabling them to "hold their seats as long as they live, and there is no authority to disposses them." *Id.* at 813.

<sup>30</sup> Among other states, Georgia and Virginia imposed durational residency requirements of three years and one year, respectively. 2 *The Documentary History of the First Federal Elections, 1788-1790* 293, 453-57 (Gordon DenBoer and Merrill Jansen eds. 1984) (hereafter *First Federal Elections*). One observer reported the

candidates be qualified voters under state law. A failure to satisfy either such requirement would render a candidate ineligible for Congress, even if he satisfied the ones contained in the Qualification Clauses.

The court below was troubled by the fact that Amendment 73 requires incumbent congressional candidates, after a specified period in office, thereafter to run for reelection as write-in candidates. See Pet. App. 15a. But the proposition that an incumbent has a right to have his name appear on the ballot would have been unknown to the Framers. Until the late 1800's, all ballots cast in this

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following concerning the Georgia residency requirement: "Even though the law itself contained a provision that Representatives must have been residents for three years of the districts they represented, the House apparently believed that the provision needed emphasis. On February 4, 1789, shortly before the election, it resolved, in effect, that even if a nonresident received more votes than a three year resident, he was not eligible and was not to be commissioned a Representative by the governor." *Id.* at 293. In Virginia, moreover, candidates for the House of Representatives were required to be freeholders. *Id.* at 293. Virginia's enumeration of eligibility requirements for congressional candidates certainly was not unknown to the Framers: In the election of 1789, James Madison was a successful candidate for the House of Representatives from one of the ten districts, narrowly defeating James Monroe. There is no indication that Madison objected to Virginia's presumed authority to impose its own restrictions on candidates for Congress.

The court below relied on the fact that the Framers declined to insert a term limit requirement into Article I. See Pet. App. 12a. That conclusion, however, is mistaken. The Framers' refusal to impose term limits as a matter of federal law is not tantamount to a ban on term limits imposed under state law. It is significant to note in this regard that Pennsylvania imposed a rotation requirement on its delegates to Congress in the first federal elections, held in 1788. Pa. Const. of 1776, § 11, reprinted in 5 *Federal and State Constitutions* 3085 (Francis N. Thorpe ed. 1909) (reprinted 1993); see also 1 *First Federal Elections* 229-30. Although Pennsylvania deleted that requirement for all of its elected officials with the adoption of the 1790 state constitution, it appears that the state believed that its original rotation provision for federal delegates did not violate Article I.

country were write-in ballots, the system of state-prepared ballots was introduced no earlier than 1888. Prior to that time, voters composed their own ballots or used preprinted tickets prepared by political parties.<sup>31</sup> Since the institution of state-sponsored, preprinted ballots became commonplace, and because states restrict the number of candidates who can be listed on such ballots, it has always been the case that some citizens cannot vote for the candidate of their choice unless they exercise a write-in option.<sup>32</sup> Accordingly, the need for incumbents to run

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<sup>31</sup> See *Burdick v. Takushi*, 112 S. Ct. 2059, 2070 (1992) (Kennedy, J., dissenting); *Burson v. Freeman*, 112 S. Ct. 1846, 1852 (1992); see also L.E. Fredman, *The Australian Ballot: The Story of An American Reform* ix (1968).

<sup>32</sup> Ballot access laws, like Amendment 73, also have been challenged under the First and Fourteenth Amendments. Amendment 73 does not violate the First Amendment, however, because it does not restrict access to the ballot on the basis of political affiliation or ideology; it restricts ballot access only on the basis of incumbency which is a politically-neutral criterion. Amendment 73 also does not violate the Fourteenth Amendment. There is no fundamental right to run as, or to vote for, a candidate, see, e.g., *Burdick v. Takushi*, 112 S. Ct. at 2063; *Clements v. Fashing*, 457 U.S. 957, 963 (1982); incumbents, as a group, are not politically powerless and therefore in need of special protection from the majoritarian political process, cf., e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); and the status of "incumbency" is not an immutable characteristic, like race, that is entitled to heightened judicial protection, cf., e.g., *City of Cleborne v. Cleborne Living Center, Inc.*, 473 U.S. 432, 445 (1985). Rather, ballot access restrictions should be upheld if they rationally promote important state interests. See *Anderson v. Celebrezze*, 460 U.S. 780, 786, 789 (1983). Amendment 73 passes that test. It helps to offset what are sometimes said to be insurmountable advantages held by incumbents in order to promote frequent rotation in office of elected officials, and ultimately to ensure that officials are representative of, and responsive to, the public. Those objectives are legitimate and important, and they are rationally furthered by ballot access or term limit restrictions. For those reasons, this court and the lower courts have consistently upheld such laws over First and Fourteenth Amendment claims, even without a write-in provision and even when the ban lasts for a

as write-in candidates does not render the ballot access restrictions imposed by Amendment 73 an impermissible qualification under Article I.<sup>33</sup>

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lifetime. See, e.g., *State ex rel. Maloney v. McCartney*, 223 S.E.2d 607, 611 (W. Va.) (upholding two-term limit for governor; "restrictions upon the succession of incumbents serves a rational public policy \* \* \* and the over-all health of the body politic is enhanced by limitations on continuous tenure"), appeal dismissed for want of a substantial federal question, 425 U.S. 946 (1976); *Miyazawa v. City of Cincinnati*, 825 F. Supp. 816, 821 (S.D. Ohio 1993) (upholding term limits for city council members); *Legislature v. Eu*, 816 P.2d 1309, 1327-28 (Cal. 1991) (upholding term limits for state legislators because "the interests of the state in incumbency reform outweigh any injury to incumbent office holders and those who would vote for them"), cert. denied, 112 S. Ct. 1292, 1293 (1992); *Maddox v. Fortson*, 172 S.E.2d 595, 598-99 (Ga.) (upholding term limits for state offices), cert. denied, 397 U.S. 149 (1970).

<sup>33</sup> We believe that this Court should grant review at this time to decide the question presented in this case. Several lawsuits challenging the constitutionality of other term limit or ballot access laws have been filed in state and federal court, and one such case is now on appeal to the Ninth Circuit. See *Thorsted v. Gregoire*, 841 F. Supp. 1068 (W.D. Wash. 1994), appeals pending *sub nom. Thorsted v. Munro*, Nos. 94-35222 *et al.* (9th Cir.); *Plante v. Smith*, No. 92-CV-40410 (N.D. Fla.). Three state courts of last resort have issued opinions in such cases, but only one has issued a final judgment invalidating a term limit or ballot access law. Compare *Duggan v. Beerman*, No. S-92-907 (Neb. May 13, 1994) (law invalidated on state law grounds due to insufficient signatures on initiative petitions) with *Opinion of the Justices*, 595 N.E.2d 292 (Mass. 1992); *Stumpf v. Lau*, 839 P.2d 120 (Nev. 1992). Other decisions by the lower federal and state courts interpreting the Qualifications Clauses, see, e.g., Robert C. DeCarli, 71 Tex. L. Rev. 871-72 nn.36-37 (collecting cases), predated this Court's decision in *Storer* and therefore need to be reconsidered in light of this Court's ruling in that case. Briefing is underway in the *Thorsted* case, and it may be argued this summer. It therefore may be possible for this Court to have the views of the Ninth Circuit on the constitutional question when this Court returns from its upcoming summer recess.

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

**WINSTON BRYANT \***

**Attorney General**

**JEFFREY A. BELL**

**Deputy Attorney General**

**ANN PURVIS**

**Assistant Attorney General**

**200 Tower Building**

**323 Center Street**

**Little Rock, AR 72201**

**(501) 682-2007**

**GRIFFIN B. BELL**

**PAUL J. LARKIN, JR.**

**POLLY J. PRICE**

**KING & SPALDING**

**1730 Pennsylvania Ave., N.W.**

**Washington, D.C. 20006-4706**

**(202) 737-0500**

**CLETA DEATHERAGE MITCHELL**

**Term Limits Legal Institute**

**900 Second St., N.E.**

**Suite 200A**

**Washington, D.C. 20002**

**(202) 371-0450**

**\* Counsel of Record**

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*Attorneys for Petitioner*

